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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

ACME REFRIGERATION OF BATON ROUGE, INC.,
Petitioner

versus

WHIRLPOOL CORPORATION & HEIL QUAKER CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether or not a parent corporation and its wholly-owned subsidiary constitute a single economic unit as a matter of law so as to be the same seller in a price discrimination action for violation of section 2 of the Clayton Act of 1914, as amended by the Robinson-Patman Act, 15 U.S.C. §13?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

ACME REFRIGERATION OF BATON ROUGE, INC.*
Petitioner

VERSUS

WHIRLPOOL CORPORATION & HEIL QUAKER CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals reversing the District Court's judgment based on a jury verdict in favor of Petitioner appears as Appendix A to this petition, and is reported at 785 F.2d 1240. The Per Curiam opinion of the Fifth Circuit denying a petition for rehearing and suggestion for rehearing en banc appears as Appendix B to this petition. The opinion of the District

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* Petitioner has no parent companies, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

Court denying Summary Judgment is not reported but is attached as Appendix C. The District Court's memorandum order on pre-trial motions appears as Appendix D. The District Court's post-trial written reasons and order appears as Appendix E. The judgment of the District court appears as Appendix F.

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was filed on March 28, 1986. The application for a rehearing and suggestion for rehearing en banc were both timely filed on April 9, 1986. The application for rehearing was denied on April 28, 1986. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

PERTINENT STATUTORY PROVISIONS

15 U.S.C. Section 13(a)

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular posession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person

who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:
. . ."

15 U.S.C. Section 15(a)

"Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee.
. . ."

STATEMENT OF THE CASE

This complaint seeking damages against defendants Whirlpool Corporation and its wholly-owned subsidiary Heil Quaker Corporation for alleged price discrimination in violation of the Robinson-Patman Act was filed in the United States District Court for the Western District of Louisiana. Jurisdiction was alleged on the basis of 28 U.S.C. 1337 and under the provisions of 15 U.S.C. Sections 13 and 15.

For plaintiff (petitioner herein) to prevail, defendant Whirlpool Corporation and its wholly-owned subsidiary Heil Quaker Corporation must be considered to constitute one "economic unit" as the "same seller" since the discriminatory sales were made to plaintiff by Whirlpool

and to plaintiff's competitor by Heil Quaker.

Defendants filed a Motion for Summary Judgment contending that as a matter of fact the parent did not control the subsidiary and that they were not a single economic unit so as to be the "same seller" under the Robinson-Patman Act. Plaintiff opposed this Motion contending that based on the decision of the Fifth Circuit in *Security Tire and Rubber Company v. Gates Rubber Company*, 598 F.2d 962 (1979) cert. den 444 U.S. 942 (1980), the prior "factual control" test for the "single economic entity" doctrine had been reversed and that as a matter of law, a parent and its wholly-owned subsidiary were one "economic entity" and the "same seller". Alternatively, plaintiff contended that there were disputed factual issues to be determined on trial as to "control". On July 27, 1983, the lower Court rendered a written opinion denying the Motion for Summary Judgment. (Appendix C).

Thereafter, on June 19, 1984, this Court rendered its decision in the case of *Copperweld Corporation v. Independence Tube Corporation*, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). After this decision and prior to trial, plaintiff filed a Motion *in limine* to strike the defense that defendants were not a single "economic entity" and the "same seller". Prior to trial, the District Court granted plaintiff's Motion (Appendix D, paragraph 5) and granted plaintiff's request to instruct the jury that Whirlpool and Heil Quaker were the "same seller".

The jury rendered a verdict in favor of plaintiff. Post-trial Motions by defendants were denied. Judgment was entered in keeping with the jury verdict. (Appendix F.).

The judgment of the Lower Court was reversed by the Fifth Circuit Court of Appeals for reasons set forth in the opinion filed on March 28, 1986. (Appendix A). Rehearing was denied on April 28, 1986 in a Per Curiam opinion. (Appendix B). In neither opinion did the Fifth Circuit refer to the opinion of this Court in *Copperweld*, although in all briefs the Court's attention had been specifically directed to that decision.

REASONS FOR GRANTING THE WRIT

In *Copperweld Corporation v. Independence Tube Corporation*, supra, this Court held as a *matter of law* that a parent corporation and its wholly-owned subsidiary constituted a single economic unit for purposes of Section 1 of the Sherman Act. We can only assume, from the lack of discussion of *Copperweld's* applicability to the "single enterprise" issue, that the Court below concluded your decision was limited to the Sherman Act conspiracy doctrine.

The Sixth Circuit has taken a contrary view. In *Russ' Kwik Car Wash v. Marathon Petroleum Company*, 772 F.2d 214 (6th Cir. 1985), that Court in a Robinson-Patman Act case overruled a previous line of "factual control" cases on the "single entity" doctrine, relying on this Court's decision in *Copperweld*.

The Sixth Circuit, after recognizing that although *Copperweld* dealt with combinations or conspiracies between a parent corporation and its subsidiary, nonetheless pointed out that this Court had stated without qualification that a subsidiary acts for the benefit of the parent. The Court further quoted from footnote 18 of *Copperweld*,

supra, pages 2742-2743, where this Court had discussed the various criteria for the "single entity" factual control test and noted this Court's observation that those factors could not overcome the legal conclusion that a parent and its wholly-owned subsidiary were a single economic unit. The Sixth Circuit then reversed an earlier line of factual control cases and held as a matter of law that a parent and its subsidiary "are a single economic unit". *Russ Kwik,* supra, 221.

The factual context in which *Russ Kwik* arose involved the "same purchaser" doctrine, as did the Fifth Circuit's decision in *Security Tire and Rubber Company v. Gates Rubber Company,* 598 F.2d 962 (1979), cert. denied 444 U.S. 942 (1980). In *Security Tire,* the Court held as a *matter of law,* not fact, that a parent corporation and its wholly-owned subsidiary constituted a single economic unit and therefore transfers between them did not constitute sales as there was only one purchaser. In reversing the Lower Court in the instant case, the Appellate Court held that the Trial Judge misconstrued the opinion of the panel that decided *Security Tire* by applying the corollary of the "same purchaser" rule in the factual context of the "same seller" rule.

A review of the Trial Judge's written ruling denying the Motion for Summary Judgment (Appendix C) indicates that the Fifth Circuit misconstrued the reasons given by the Lower Court in denying the Motion for Summary Judgment at the time the opinion was given. It is true the Trial COurt did indicate that possibly the corollary of *Security Tire* and the "same purchaser doctrine would apply to a parent and its subsidiary as the "same seller". However, the denial at that time was based on questions of fact involved. It was only after *Copperweld* was decided by this

Court that the Trial Judge granted plaintiff's Motion *in limine* and held that as a matter of law a parent and its wholly-owned subsidiary constituted one economic unit and therefore they were the "same seller".

Even prior to *Copperweld*, a Trial Judge in the Southern District of Mississippi noted in *Uniroyal, Inc. v. Hoth & Thames, Inc.*, 511 F.Supp. 1060 (S.D. Miss. 1981) that the parties had agreed that as a corollary of *Security Tire* the doctrine should be applied to the "same seller" in a Robinson-Patman price discrimination suit. This decision was cited with approval in another panel decision of the Fifth Circuit Court in *Eximco, Inc., v. Trane Company*, 737 F.2d 505 (5th Cir. 1984) in reiterating approval of *Security Tire*.

In the opinion below, the Court observed that for years the Courts have wrestled with the problem of determining how affiliated corporations fit into the scheme of price discrimination anti-trust litigation. Such litigation would be avoided by uniformity in the application of anti-trust legal principles.

Examination of this case and the citations referred to herein illustrates this lack of uniformity in dealing with the "single entity" doctrine between a parent corporation and its wholly-owned subsidiary. We have these holdings:

1. A corporation and its wholly-owned subsidiary are a "single economic unit" as a matter of law and the "same seller" under Robinson-Patman (Trial Judge's instruction to the jury in this case).

2. Acorporation and its wholly-owned subsidiary are a "single economic unit" as a matter of law" under the "same purchaser" doctrine under Robinson-Patman (*Security Tire*, supra).

3. A corporation and its wholly-owned subsidiary as seller are separate economic units and there must be a factual "affirmative showing" of "control" under the Robinson-Patman "same seller" doctrine. (Court of Appeal decision in the instant case).

4. A corporation and its wholly-owned subsidiary are a single economic unit as a matter of law under Robinson-Patman for all purposes, (*Russ Kwik*, supra), under both the "same seller" and "same purchaser" doctrine since the Sixth Circuit relied on *Copperweld* in overuling the criteria control test.

5. A parent and its wholly-owned subsidiary are the same economic unit as a matter of law under Section 1 of the Sherman Act (*Copperweld*, supra).

CONCLUSION

To borrow the words of the Fifth Circuit, there should be an end to the "wrestling" by the Courts with the problem of determining how affiliated corporations fit into the scheme of anti-trust laws.

Uniformity in the application of the anti-trust laws in this area can be achieved only if a corporation and its wholly-owned subsidiary, as a matter of law, are considered as constituting a single economic unit as a seller and as a purchaser.

We respectfully suggest that that this petition for a writ of certiorari should be granted so that this Court may establish such uniformity.

Respectfully submitted:

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PROOF OF SERVICE

I, Roger M. Fritchie, attorney for Acme Refrigeration of Baton Rouge, Inc. petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 9th day of July 1986, I served the foregoing petition for a writ of certiorari, and its appendices, on Whirlpool Corporation and Heil Quaker Corporation, respondents in connection with this application for a writ of certiorari by mailing three copies thereof to its counsel of record, Michael R. Turnoff, 7500 Sears Tower, Chicago, IL., 60606, and to Timothy J. McNamara, 102 Versailles Blvd., Lafayette, LA, 70501.

ROGER M. FRITCHIE

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACME REFRIGERATION
of BATON ROUGE, INC.,
Plaintiff-Appellee,

v.

WHIRLPOOL CORPORATION &
HEIL-QUAKER
CORPORATION,
Defendants-Appellants

NO. 85-4043
OPINION

Filed March 28, 1986

Before: John R. Brown, Thomas M. Reavley and Robert M. Hill, Circuit Judges.

Opinion by Judge Thomas M. Reavley

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

OPINION

THOMAS M. REAVLEY, Circuit Judge:

Defendants Whirlpool Corporation and Heil-Quaker Corporation appeal the district court's judgment in favor of plaintiff Acme Refrigeration of Baton Rouge, Incorporated (Acme). We reverse.

FACTS

This litigation focuses on the sale of "Whirlpool" brand heating and air conditioning equipment in a thirteen-parish area located in southwest Louisiana (the "trade area"). The equipment is manufactured by Heil-Quaker, a Delaware corporation, at its plants in Tennessee. At the time of trial, Heil-Quaker marketed its products by contracting with 54 distributors.

Whirlpool, another Deleware corporation, is a major manufacturer of household appliances and other "white goods," and its thirteen sales divisions distribute these products nationwide, In addition, three of its sales divisions[1] sold heating and air conditioning equipment, contracting with Heil-Quaker as their supplier. One of these three divisions, the Houston, Texas sales division ("HSD"), sold this equipment well outside the geographic region specified in its agreement with Heil-Quaker, that region being the Houston metropolitan area. Besides selling this equipment to buyers located in other Texas cities, HSD contracted with two Louisiana distributors who serviced the trade area, Cooling and Heating, Incorporated (located in Lafayette) and Cooling & Heating of Lake Charles, Incorporated (collectively, "C & H").

On January 1, 1981, Acme purchased the assets of C & H. On March 2, HSD executed a Dealer Sales Agreement (the "Agreement") with Acme, supplying it with Whirlpool brand equipment for the remainder of the year. Although no written contract was executed for 1982, the Agreement

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[1] These sales divisions are located in Houston, Texas; Kansas City, Missouri; and Charlotte, North Carolina.

contained an automatic renewal clause, which provision was subsequently triggered by HSD's failure to give Acme timely notice of its decision not to renew their contract for 1982.[2]

By the end of 1981, Heil-Quaker, disappointed with its share of the Houston market, decided that HSD should concentrate all its efforts on the Houston area. Unaware of any formal agreements HSD had executed, Heil-Quaker directed HSD to sever its "associate distributorships" by June 30, 1982. Contemporaneously, Heil-Quaker sought a distributor which could service all of the major Louisiana markets, including those outside the trade area. On April 21, 1982, Heil-Quaker appointed Solar Supply Company, Incorporated (Solar) to be its exclusive distributor in Louisiana. Solar's entry into the market immediately ended Acme's monopoly in the trade area. Moreover, Acme found itself at a competitive disadvantage because Solar—buying directly from Heil-Quaker instead of from HSD—was able to lower its cost of supply and pass the savings on to its customers.

Acme stopped buying equipment from HSD in July of 1982 and brought this suit in the district court. In its amended complaint, Acme charged, *inter alia*,[3] (1) that Heil-Quaker, as a wholly -owned subsidiary of Whirlpool, is the "alter ego" of Whirlpool, (2) that Heil-Quaker's sales are therefor imputable to Whirlpool, (3) that Whirlpool

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[2] The Agreement called for HSD to notify Acme at least thirty days prior to the contract's expiration, December 31, 1981. It is undisputed that HSD failed to give such notice.

[3] The trial court dismissed Acme's claims based on Louisiana antitrust law and its claim based on § 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1982).

discriminated in price between Acme and Solar[4] in violation of § 2 of the Clayton Act of 1914, as amended by the Robinson-Patman Act of 1936, 15 U.S.C. § 13 (1982) (the "Act"), (4) that its Agreement with HSD was breached because it was forced to stop making purchases under that contract, and (5) that HSD had made several fraudulent misrepresentations. The jury returned a verdict in favor of Acme on all its claims and awarded $252,612 in damages. The trial court, entering judgment against defendants Whirlpool and Heil-Quaker on the antitrust claim, trebled damages to $757,837.[5] This appeal followed the trial court's denial of defendants' motions for a judgment n.o.v. and for a new trial.

DISCUSSION

A. *Price Discrimination*

[1] In order to make a claim of price discrimination, a plaintiff must allege that a given commodity was sold to two different buyers at two different prices by the same seller. For years courts have wrestled with the problem of determining how affiliated corporations fit into this scheme. Whirlpool and its wholly-owned subsidiary, Heil-Quaker, are distinct legal entities. The district court, however, treated the two as one. Relying on *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979, (*cert. denied*, 444 U.S. 942 (1980), the trial judge held that, as a matter of law, a parent corporation and its

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[4] The price charged Acme by Whirlpool's Houston sales division was higher than the price charged Solar by Heil-Quaker.

[5] The court's judgment as to Acme's contract and tort claims was conditioned upon the judgment it entered on the antitrust claim.

wholly-owned subsidiary constitute as single economic unit, and he instructed the jury to consider Whirlpool and Heil-Quaker as the same seller.[6] We conclude that the trial judge misinterpreted *Security Tire.*

In *Secuirity Tire,* a parent corporation and its wholly-owned subsidiary sold same commodity, the subsidiary selling only what was first transferred to it by the parent. The plaintiff, who bought from the parent, charged that the subsidiary received a lower price. A panel of this circuit held that, as a matter of law, transfers from a parent corporation to its wholly-owned subsidiary cannot be considered "sales" to a "favored" buyer. 598 F.2d at 967. Because the plaintiff did not allege that the parent favored any other buyer, the court could find no price discrimination.

[2] Although it attached no competitive significance to the price charged a subsidiary by its parent, the court emphasized that its holding was limited to situations where the subsidiary acted as buyer, not seller. Acknowledging that a subsidiary's own sales can form the basis for a claim of price discrimination, the court expressly left intact the "same seller" doctrine. *Id.* at 966. Under such a theory, a subsidiary's sales are imputed to its parent if the latter "actively controls" the former. *Id.* Therefore, if a parent and its "controlled" subsidiary charge different buyers different prices for the same commodity, they will have violated the Act. The same seller doctrine, however, is not to be invoked merely upon a showing that one seller

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[6] Previous to this instruction, the trial court, in denying the summary judgment motion of Whirlpool and Heil-Quaker, decided the "single entity" isue in favor of Acme. It subsequently granted Acme's motion *in limine* to exclude any evidence at trial bearing on the issue.

is wholly owned by another. Instead, there must be an "affirmative showing" that the parent actively controls its subsidiary. *Id. See.* III E. Kintner & J. Bauer, *Federal Antitrust Law* § 21.16, at 212 (1983); 4 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 24.04[2][a](1985).

[3] In the absence of evidence that Whirlpool either actively controlled Heil-Quaker or the terms of the latter's sales, we must conclude that they are not the same seller. *See Hiram Walker, Inc. v. A & S Tropical, Inc.* 407 F.2d 4, 8 (5th Cir.), *cert.denied,* 396 U.S. 901 (1969); *Baim & Blank, Inc. v. Philco Corp.,* 148 F.Supp. 541, 543-44 (E.D.N.Y. 1957). In its amended complaint, Acme acknowledged that Whirlpool and Heil-Quaker were separate corporations; nevertheless, it alleged that Heil-Quaker was the "alter ego" of Whirlpool. Whirlpool and Heil-Quaker moved for summary judgment, arguing that no factual dispute existed concerning their corporate relationship, that the undisputed facts demonstrated that Whirlpool did not actively control Heil-Quaker, and that they could not otherwise be considered the same seller. Attached to their motion were various affidavits, including those of HSD's general manager and Heil-Quaker's vice-president of marketing. These officials stated that Heil-Quaker's president and chief executive officer was neither an officer nor a director of Whirlpool; that all of Heil-Quaker's distributors operated under year-long contracts which were approved—then later either renewed or terminated at the close of the year—solely by Heil-Quaker, a decision reached without any participation by Whirlpool; that Heil-Quaker had previously not renewed distributorship contracts with other Whirlpool sales divisions because of poor performance; that Heil-Quaker's prices, terms and conditions of sale were determined and established solely by its

personnel; and that HSD's prices, terms and conditions of sale were determined and established without consultation with Heil-Quaker.

[4] The extent of Acme's evidence in opposition was an affidavit of its accountant, who stated that Whirlpool prepared and filed its financial reports on a consolidated basis. Acme failed to raise an issue of material fact concerning Whirlpool's alleged control of Heil-Quaker; furthermore, Acme has never pleaded actual control and does now suggest that any other evidence exists in its favor bearing on the issue of control. We conclude that the uncontroverted facts establish that Whirlpool and Heil-Quaker are not the same seller. Moreover, Acme did not allege that Whirlpool and Heil—Quaker, considered separately, discriminated in price. Therefore, we hold that Acme failed to raise any issue of price discrimination. Defendants' motion for summary judgment should have been granted. Failing this, their motion for judgment n.o.v. should have been granted.

B. *Acme's State Claims*

Acme was forced to choose between holding firm on price, thereby losing sales to Solar, and slashing prices, thereby making its sales unprofitable. Moreover, shortly after its appointment in April of 1982, Solar began informing its customers that, 90 days hence, Acme would no longer be distributing Whirlpool products, Declining to add to its mounting inventory, Acme stopped buying equipment and brought this suit instead, charging that blame lay with Whirlpool.

1. *Breach of Contract*

[5] Acme's theory that its Agreement with HSD was breached is a confused one. On one hand, Acme identified the breach—and the court so instructed the jury—as Heil-Quaker's selection of Solar to be its exclusive distributor in Louisiana. On the other, Acme charged that its inability to continue making purchases under the Agreement constituted a breach thereof. Under either theory, we find no evidence whatsoever that HSD breached the Agreement. Therefore, the trial court erred by denying defendant's motion for a judgment n.o.v. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

[6] Heil-Quaker's appointment of Solar is of no consequence. By its own terms, the Agreement was non-exclusive.[7] Moreover, Solar became Heil-Quaker's distributor, not HSD's.[8] Finally, it was Acme's decision to stop buying equipment, and there is no evidence—nor does Acme allege—that HSD violated a specific provision of their Agreement or that HSD was unwilling to supply Acme for the balance of 1982. We conclude that no breach of contract is shown.

2 *Fraudulent Misrepresentation*

[7] Acme's fraud claim is based on statements

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[7] We consider below Acme's contention that HSD represented that Acme was to remain the exclusive Whirlpool distributor in the trade area.

[8] We note that Acme had a claim of interference with business relations lodged against Heil-Quaker. Such a claim, however, does not reach HSD. Upon Heil-Quaker's motion, the court dismissed Acme's claim prior to trial.

allegedly made by Tom Bowers, now deceased,[9] who, as one of HSD's three sales managers, headed its heating and cooling department. The alleged misrepresentations are that Bowers told Acme in January of 1982 that it would have an exclusive distributorship through 1982; that, in April of 1982, Bowers denied the fact of Solar's appointment; and that Bowers told Acme in May of 1982 that it would be charged the same prices that Heil-Quaker charged Solar. We conclude that the record will not support Acme's claim, and a judgment n.o.v. would have been proper. *See Boeing,* 411 F.2d at 374.

Our resolution of Acme's claim requires that we consider the interests of the various parties involved. Heil-Quaker's disenchantment with HSD had less to do with HSD's association with Acme than it did with HSD's failure to penetrate the Houston market. Bowers' reluctance to accommodate Heil-Quaker's request to terminate HSD's relationship with Acme had less to do with notions of a contractual obligation[10] than it did with the fact that Acme was a source of considerable business and profit to HSD. Finally, there is no evidence—and Acme does not allege—that Heil-Quaker could have or would have suspended its own sales to HSD if HSD refused to stop selling to Acme.

[8] Turning now to Bowers' first statement, Acme argues that Bowers knew since December of 1981 that

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[9] Bowers died the month after this suit was brought.

[10] HSD entered into many distributorship contracts, which numbered 233 in 1984. Charles Pitner, HSD's general manager, testified that HSD was able to sever its contracts with some of its other associate distributors because of a contractual provision allowing termination, upon 30 days' notice, if based upon dissatisfaction with performance.

Heil-Quaker wanted Acme phased out by June 30, 1982. We have already ruled that the HSD-Acme Agreement was not breached, and the evidence reveals that Bowers was steadfastly reluctant to terminate HSD's relationship with Acme. Moreover, there is no evidence that Bowers believed his negotiations with Heil-Quaker ever reached the point where the HSD-Acme Agreement was imperiled. In fact, at the time of the December meeting. Heil-Quaker itself considered selling directly to Acme. The evidence of Bowers' statement as to Acme's distributorship in 1982 does not support a fraud claim. As to the distributorship being exclusive, Acme's claim is defective in two respects. Heil-Quaker controlled the distribution of the products it manufactured. Because Bowers could not bind or otherwise make decisions for Heil-Quaker, it would have been unreasonable to rely on Bowers' promise that Acme's distributorship would remain exclusive. Furthermore, the trial court correctly instructed the jury that unfulfilled promises cannot form the basis for fraud. *See Gamble v. Carter,* 378 So.2d 185, 186 (La. App. 1979); *Swann v. Magouirk,* 157 So.2d 749, 751 (La. App. 1963).

[9] As to Bowers' denial of Solar's appointment, Acme relies upon the testimony of its equipment manager, Commodore Lloyd, who testified that he called Bowers twice, a week before and about a week after Solar's appointment on April 21, 1982, The evidence indicates that the extent of Bowers' knowledge, gained subsequent to Lloyd's first phone call, was merely that Solar was under consideration by Heil-Quaker for a distributorship. As to the second phone call, made nine days after Solar signed the contract and three days before Acme itself received formal notification. Acme's Lloyd testified only that Bowers said he "still didn't know anything." Acme's own exhibit, an inter-office

memorandum written by Bowers, reinforces the fact that Bowers was not privy to the corporate decisions of either Solar or Heil-Quaker. We conclude that the evidence does not support Acme's claim that Bowers' statements were false.

Finally, Bowers' statement regarding pricing was not a representation but was instead a promise to do something in the future, thereby not being actionable as fraud. Although an exception to the rule is made where it is proved that the promiser had no intention of fulfilling his promise, *see Gamble*, 378 So.2d at 186, there is no evidence here to support—and Acme does not make—such an allegation.

REVERSED AND REMANDED for dismissal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACME REFRIGERATION
of BATON ROUGE, INC.,
Plaintiff-Appellee,

v.

WHIRLPOOL CORPORATION &
HEIL-QUAKER
CORPORATION,
Defendants-Appellants

NO. 85-4043
OPINION

Filed April 28, 1986

Before: John R. Brown, Thomas M. Reavley and Robert M. Hill, Circuit Judges.

PER CURIAM

Appeal from the United States District Court
for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

OPINION

Per Curiam:

By our prior opinion we intended to make no holding to locate or measure the burden of proof on the issue of control by the parent corporation of its wholly owned subsidiary where a buyer urges that the parent and subsidiary are guilty of price discrimination. The evidence on that issue in this case denied that control, and neither pleading nor proof from the buyer implicated the existence of control.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western District of Louisiana
FILED
JUL 26 1983

ACME REFRIGERATION OF
BATON ROUGE, INC.
VS. CIVIL ACTION NUMBER
821641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION S

RULING

The Robinson-Patman Act Violations

In *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), the Fifth Circuit stated that price discrimination under Section 2(a) of the Robinson-Patman Act requires that a plaintiff establish *two* separate and contemporaneous sales transactions made by the same seller to *two* distinct purchasers. No single sale can violate the act, one purchaser must pay more than another purchaser and there must be two or more transactions at different prices. The Court in *Security Tire* held that a transfer from a parent corporation to its wholly-owned subsidiary corporation can never be considered separate sales to a favored customer in a Robinson-Patman Act discrimination suit.

In this case Heil-Quaker, a subsidiary of Whirlpool, made the transfers to Whirlpool's Houston branch and to Solar. As in *Security Tire*, it may be sensible to treat Whirlpool, the parent corporation, its branch office, Houston, and its subsidiary corporation, Heil-Quaker, as a single economic unit under the Robinson-Patman Act claim. If this is so, Whirlpool was a single seller to two distinct purchasers, the plaintiff, Acme, and Solar, at different prices which favored Solar. To determine whether the parent actively controls a wholly-owned sales subsidiary where the subsidiary's sales are attributable to the parent herein, raises questions of fact. Therefore, the Motion for Summary Judgment on the Robinson-Patman Act claim is DENIED.

The Sherman Act Viloations

Plaintiff alleges that Whirlpool and Solar agreed to a horizontal territorial division of markets whereby Whirlpool would withdraw from Louisiana and no longer make sales to Acme.

It is clear from the facts that the manufacturer, Heil-Quaker, was the source of any decision to terminate Whirlpool as a Louisiana distributor, and therefore any possible conspiracy or agreement is a vertical one. The same would be true in the case of a conspiracy between a manufacturer and one of its distributors. Vertical restrictions on intrabrand competition will be found reasonable as a matter of law when the defendant-manufacturer has only a small market share. See *Red Diamond Supply, Inc. v. Liquid Carbonic Corporation*, 637 F.2d 1001 (1981) and cases cited therein. The record herein is clear that Heil-Quaker, even after Acme was replaced by Solar, had only a 3.9%

market share for central air conditioning products in Louisiana. It is clear that this was a decision by Heil-Quaker to increase interbrand competition and increase its market share. Since Heil-Quaker lacks market power it cannot affect the price of its product. Thus any vertical restraint could not be anticompetitive at the interbrand level as interbrand competition acts as a significant check on the exploration of intrabrand market power. However, the plaintiff's allegations of a conspiracy against Acme on the basis of price fixing raises another question. Vertical price restrictions are *per se* illegal. *Continental T.V.*, 413 U.S. at 51 n.18, 97 S.Ct. at 2558 n.18. *Red Diamond Supply, Inc.*, 637 F.2d at 1005. Heil-Quaker contends that it established its prices to its two buyers. Solar and Houston and each such buyer fixed or established independently of the other and of Hail-Quaker its respective resale price. The problem is that unless Houston resold to Acme at the same price it bought, Heil-Quaker, for all practical purposes, forced Acme to purchase at a discriminatory price in favor of Solar. Therefore, defendants' motion in regard to the Sherman Act price fixing claim is DENIED.

Since the Louisiana Antitrust Law essentially copies the federal statute the defendants' Motion for Summary Judgment on this claim is also DENIED. The Motion for Summary Judgment directed at plaintiffs' unjust enrichment claim will be GRANTED. As to the remaining state claims, defendants' motion will be DENIED.

Opelousas, Louisiana, July 27, 1983.

/s/

John M Shaw
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
in Opelousas

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
Oct 4-1984

ACME REGRIGERATION OF
BATON ROUGE, INC.

CIVIL NO. 82-1641
DATE October 3, 1984

VS
WHIRLPOOL CORPORATION

MEMORANDUM OF PRE-TRIAL CONFERENCE

APPEARANCES: Wallace Hunter for the plaintiff; John L. Ropiequet, Michael Turoff, and Timothy J. McNamara for the defendants.

A pre-trial conference was held this date with all parties present. Trial is set for the week of October 9, 1984 Juries for all cases to be tried such week will be selected on October 9, 1984, beginning at 9:30 a.m.

A final list of "will call" witnesses shall be filed ten (10) days before trial; all "may call" witnesses will be deleted at that time. All exhibits which each party plans to offer at trial shall be marked and a list of said exhibits filed with the Clerk of Court in Opelousas five (5) working days before trial.

In jury cases, any special jury instructions shall be submitted five (5) working days before trial. In non-jury cases: a) each party shall submit a memorandum outlining the facts he expects to prove and legal authorities relied upon, which memorandum shall be filed five (5) working days prior to trial; b) one (1) full working day prior to trial, each party shall submit proposed findings of fact and conclusions of law.

The joint pre-trial stipulations filed pursuant to our standing pre-trial order is accepted by the Court and made part hereof, its porvisions to govern at the trial, subject, however, to the following modifications:

None. The pretrial stipulation was previously filed on March 22, 1984.

(1). Plaintiff's counsel moved and the court ordered that counts II and III be dismissed with prejudice.

(2). On motion of the defendants the court ruled that the tortious interference with contracts claim be dismissed as the Louisiana Supreme Court does not presently recognize the existence of such a claim. See *Eximco, Inc. v. Trane Co.*, No. 82-3591 (5th Cir. July 30, 1984). The court reserved ruling on the question of whether or not tortious interference with business relations exists. The Court will rule on Tuesday morning prior to commencement of trial.

(3) On the Defendants Motion in Limine Concerning Damages Issues, the court ruled as follows:
Issue I. Evidence of lost gross profits is admissible though it is not the measure of recovery. Thus, motion is Granted in part; Denied in part.
Issue 2. Damages claim arises only from acts subsequent to April 21, 1982. Thus, motion is Granted.

Issue 3. Damages will be determined by considering losses during the period from April 21, 1982 until December 31, 1982. Nevertheless, evidence of sales income during other time periods may be admissible. The court reserves ruling until appropriate point in the trial.

Issue 4. The motion was Granted.

(4) The plaintiff's motion in limine to exlude evidence of treble damages and attorneys fees was Granted.

(5) The plaintiff's motion in limine relative to the so-called single entity doctrine was Granted.

(6) It was also determined that the alternate will be discharged at the close of the trial proceedings.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western Distsrict of Louisians
F I L E D
Nov - 8 1984

ACME REFRIGERATION OF
BATON ROUGE, INC.

CIVIL ACTION NUMBER

VS 82-1641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION O

Judgment Entered Nov. 9, 1984

WRITTEN REASONS AND ORDER AWARDING ATTORNEYS FEES, EXPENSES AND COSTS

Reasonable Attorneys Fees

The trilogy of *Copper Liquor, Inc. v. Adolph Coors Co.* opinions of the Fifth Circuit Court of Appeals governed our analysis and award of attorneys fees, expenses, and costs herein. 624 F.2d 275 (1980); 684 F.2d 1087 (1982); 701 F.2d 542 (en banc 1983). Focusing specifically upon the

four factors of the twelve Johnson[1] factors which Judge Wisdom suggested deserved "special heed": "(1) the time and labor involved, (5) the customary fee, (8) the amount involved and results obtained, and (9) the experience, reputation and ability of counsel", *Copper Liquor II,* 624 F.2d at 583, we find as follows:

1. Wallace A. Hunter of the law firm of Durrett, Hardin, Hunter, Dameron & Fritchie, counsel for the plaintiff spent a total of 867.75 hours through November 5, 1984 in handling this matter for plaintiff. Other members of the firm and associates spent a total of 23 hours assisting Wallace Hunter in this matter through November 5, 1984 in handling this matter for plaintiff. (Plaintiff's Exhibit-Post Trial Hearing No. 2, Affidavit of W.A. Hunter; Plaintiff's Exhibit Post Trial Hearing No. 3, time records through October 18, 1984, date of verdict; Plaintiff's Exhibit-Post Trial hearing No. 4, time records to date of hearing).

2. The services of Wallace A. Hunter may reasonably be valued at $125.00 per hour considering his customary fee of $100.00-$125.00 per hour, the quality of services rendered herein and his general experience, reputation and ability. See Proposed Findings of Fact and Conclusions of Law on attorneys fee issue submitted by Wallace Hunter. However, because the other partners and associates performed occasional, and indeed, very minimal work in this matter and because their qualifications are not evidenced in this record the Court values their services at a rate of $100.00 per hour.

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[1] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 717-19 (5th Cir. 1974).

Utilizing the lodestar method of computation, i.e., by multiplying the number of hours reasonably expended by the hourly rate, we find an award of ONE HUNDRED TEN THOUSAND SEVEN HUNDRED SIXTY-EIGHT AND 75/100 ($110,768.75) DOLLARS a reasonaable amount of attorneys fees.

3. Additionally, the Court opts to exercise its discretion to adjust the lodestar to reflect the contingent nature of this suit, the preclusion of other employment by plaintiff's attorney due to this case, and the nature and length of the professional relationship with the client. The record reflects that the case was accepted by Wallace Hunter on a contingent fee basis and that the suit required an expenditure of long hours which could have been devoted to regular clients of Wallace Hunter, one of whom the plaintiff was not. The lodestar of $110,768.75 will be increased by one (1%) per cent, i.e., ONE THOUSAND ONE HUNDRED SEVEN AND 69/100 ($1,107.69) DOLLARS.

At the hearing on attorneys fees conducted before the Court on November 6, 1984, counsel for the defendants requested that the attorneys fees be discounted for time spent pursuing legal theories on which he was unsuccessful, specifically on Counts II and III of the complaint, the Sherman Act and Louisiana monopoly law claims, and also the Louisiana tortious inferences with business relations claim, all of which were dismissed by the Court on October 3, 1984 at the pre-trial conference. However, these claims were not clearly without merit at the time of the filing of suit, and further, the time spent in pursuing the rejected claims had a sufficient connexity with the successful claims to warrant compensation for the total time spent on this matter. Accordingly, there will be no discount on the award of attorneys fees.

With regard to costs and expenses, the Court accepts all costs and expenses submitted by Wallace Hunter through November 5, 1984 as reasonaable expenses incurred in connection with this litigation. Plaintiff's Exhibits Post Trial Hearing Nos. 2, 3 and 4. If any of these expenses are not taxable pursuant to 28 U.S.C. § 1910, then they are generally recoverable as attorneys fees. *Cooper Liquor III*, 684 F.2d at 1101. However, any of these costs and expenses which must be deemed attorneys fees will not be added to the lodestar for purposes of calculating the adjustment for the contingent and other Johnson factors.

Regarding the litigant's claim for reimbursement of expenses, the Court accepts the amounts claimed by Cleve Banquer in his affidavit as reasonable expenses, and the same will be awarded under the same analysis set forth above with one exception. The award in the amount of TWO THOUSAND SIX HUNDRED EIGHTY-FIVE AND NO/100 ($2,685.00) DOLLARS for services of Dr. G. Randolph Rice will be reduced to ONE THOUSAND SIX HUNDRED EIGHTY-FIVE AND NO/100 ($1,685.00) DOLLARS because a substantial portion of his original computations was devoted to determining losses for the year of 1983 and beyond, whereas the Court ruled on October 3, 1984 at the pre-trial conference that damages should be determined by considering losses during the period of time between April 21, 1982 and December 31, 1982. The award for costs and expenses including the claims of Wallace Hunter and the litigant total SEVEN THOUSAND SIXTY-SEVEN AND 40/100 ($7,067.40) DOLLARS.

Accordingly, it is ORDERED that an award of ONE HUNDRED ELEVEN THOUSAND EIGHT HUNDRED

SEVENTY—SIX AND 44/100 ($111,876.44) DOLLARS be imposed as attorneys fees, and that an award of SEVEN THOUSAND SIXTY—SEVEN AND 40/100 (7,067.40) DOLLARS be imposed as expenses and costs.

Opelousas, Louisiana, November 8, 1984.

/s/

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

U. S. DISTRICT COURT
Western Distsrict of Louisians
F I L E D
Nov - 8 1984

ACME REFRIGERATION OF
BATON ROUGE, INC.

CIVIL ACTION NUMBER
VS 82-1641

WHIRLPOOL CORPORATION and
HEIL-QUAKER CORPORATION SECTION O

JUDGMENT

This matter came on for trial, and a jury verdict having been duly rendered:

Therefore, the Court having had an evidentiary hearing on November 5, 1984 relative to the amount and value of inventory in keeping with the stipulation of the parties and the jury's answer to the interrogatory on this item of damages:

The Court further having had an evidentiary hearing on the plaintiff's claim for attorney fees, expenses and costs, and the Court having rendered an opinion fixing such amounts:

Judgment Entered NOV. 9, 1984

It is ORDERED AND ADJUDGED, as to Count I of the complaint, the Robinson-Patman Price Discrimination Act, the Court trebling the items of damages awarded, that judgment be entered in favor of plaintiff, Acme Refrigeration of Baton Rouge, Inc. and against defendants, Whirlpool Corporation and Heil-Quaker Corporation, in the sum of SEVEN HUNDRED FIFTY-SEVEN THOUSAND EIGHT HUNDRED THIRTY-SEVEN AND 26/100 ($757,837.26) DOLLARS together with an award of attorney fees in the amount of ONE HUNDRED ELEVEN THOUSAND EIGHT HUNDRED SEVENTY-SIX AND 44/100 ($111,876.44) DOLLARS and expenses and costs in the amount of SEVEN THOUSAND SIXTY-SEVEN AND 40/100 ($7,067.40) DOLLARS, together with interest as provided by 28 U.S.C. § 1961 from date of entry of judgment.

As to the alternative counts of the complaint, in the event the judgment rendered in the preceding paragraph is not made executory, judgment is hereby entered in favor of plaintiff, Acme Refrigeration of Baton Rouge, Inc., and against defendant, Whirlpool Corporation, in the sum of TWO HUNDRED FIFTY-TWO THOUSAND SIX HUNDRED TWELVE AND 42/100 ($252,612.42) DOLLARS together with legal interest at the rate of twelve (12%) per cent per annum from the date of judicial demand until the date of entry of judgment, and thereafter interest as provided by 28 U.S.C. § 1961, together with all costs of court.

Opelousas, Louisiana, November 8, 1984.

/s/ John M. Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE